Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978

No. 78-1414

GERALDINE ROBESON, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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March 7, 1979

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No._____

GERALDINE ROBESON, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, GERALDINE ROBESON, respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Ninth Circuit dismissing Petitioner's petition filed therein for lack of jurisdiction, which order was entered on October 2, 1978.

OPINION BELOW

The Court of Appeals for the Ninth Circuit issued no opinion.

JURISDICTION

The order of dismissal of the Court of Appeals for the Ninth Circuit was entered on October 2, 1978. A timely peti-

tion for rehearing was denied on December 18, 1978 and this petition for certiorari was filed within 90 days of that date. This court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

Under Title 29 of U.S.C. Section 160(f), did the Ninth Circuit Court of Appeals err in dismissing for lack of jurisdiction Petitioner's Petition for Review of an order by the National Labor Relations Board finding the charged party in compliance with a Board practices decision in which the Board had ordered reinstatement of Petitioner with back pay, but after which back pay was partially denied by decision of the General Counsel to the Board?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

> Section 160(f). Review of a final order of Board on petition to Court
>
> Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals. . .

STATEMENT OF THE CASE

Petitioner herein, GERALDINE ROBESON, was discharged on June 18, 1975 from her clerical position with Retail Clerks Union

Local 588. On July 8, 1975, Petitioner filed a wrongful termination charge with the National Labor Relations Board. On February 20, 1976, the General Counsel for the National Labor Relations Board issued a complaint based upon the Petitioner's charge. The matter was heard before an administrative law judge on April 29, 30 and May 3, 1976.

The administrative law judge issued a decision on August 27, 1976 finding that the Retail Clerks Union had engaged in an unfair labor practice. The decision ordered that the Retail Clerks Union Local 588 reinstate Petitioner and make her whole for any monetary losses she suffered as a result of her termination.

On December 7, 1976, the administrative law judge's decision and order was affirmed and adopted by a three member panel acting as designated agents for the National Labor Relations Board.

Subsequent to the Board's adoption of the judge's decision, a Regional Compliance Officer administratively decided without a hearing that the Regional Director would not require back pay be paid to Petitioner for the period 6/19/75 through 4/30/76, on the basis Petitioner has made insufficient efforts to gain other employ-

ment. A compliance letter was thereafter issued on May 31, 1977 closing the case. On May 28, 1977, Petitioner wrote to the Regional Director to appeal the Compliance Officer's decision. The Regional Director declined to investigate the back pay decision further in his letter to Petitioner of July 18, 1977. Petitioner then wrote the General Counsel to appeal the Regional Director's decision.

On November 14, 1977 the General Counsel sent Petitioner a letter denying Petitioner's request to overturn the Regional Director's decision. On January 4, 1978, Petitioner, through her attorney, requested a back pay specification from the Regional Director. On January 11, 1978 the request was denied.

On April 17, 1978, Petitioner filed a petition with the Ninth Circuit Court of Appeals, invoking the court's jurisdiction under Title 29 U.S.C. Section 160(f) to review the Order of the Board given in the form of a General Counsel's Compliance letter stating that the Union had fully complied with the Board's order of December 7, 1976 including that portion requiring repayment of all "earnings or other monetary losses suffered by her", and the resultant decision to close NLRB

Case #20-CA-10401. Respondent moved to dismiss the petition for lack of jurisdiction. The Court of Appeals granted respondent's motion, dismissing the appeal on October 2, 1978 without issuing an opinion. Petitioner filed timely petition for rehearing, the rehearing was denied on December 18, 1978.

REASONS FOR GRANTING THE WRIT

1. THE NINTH CIRCUIT JURISDICTIONAL DISMISSAL CONFLICTS WITH THE DECISIONS IN OTHER FEDERAL COURTS.

The Ninth Circuit Court of Appeals issued no opinion in dismissing Petitioner's Petition for Review of the NLRB action finding the charged party in compliance; and since the Circuits normally do not issue opinions when making a determination as to acceptance or rejection of jurisdiction, it is not possible to hold up other opinions in like cases in order to show the existence or non-existence of a direct conflict with the Ninth Circuit's action here. Rather, in order to demonstrate the existence of a conflict it is necessary to examine the grounds for jurisdiction provided by statute and show that in its dismissal of this case the Ninth Circuit must be held to have taken a position or positions on those statutory grounds which is in opposition to the courts of other circuits.

Petitions for Review are allowed and governed solely by the provisions of the statute in question here, Section 160(f) of Title 29 of the United States Code; and, therefore, the Ninth Circuit's decision must, in order to be in compliance with federal law, have been made on one of two bases: First, they could have felt that the Petition did not come within the terms of Section 160(f) and therefore did not qualify for review or; second, they might have felt that there existed a separate statute which exempted the actions which are the subject of the Petition from judicial review.

Regardless of whichever of these two areas the court chose to base its opinion, the Ninth Circuit's action stands in conflict either directly or in principle with the decisions of other Courts of Appeal.

(A) DOES THE PETITION FOR REVIEW IN THE INSTANT CASE FALL WITHIN THE TERMS OF THE STATUTE PROVIDING FOR JUDICIAL REVIEW OF NLRB ORDERS?

Within Section 160(f), there are two conditions which must be met in order to be entitled to judicial review. First, the Petitioner must be a "person aggrieved", and second, the aggravation must be the result of a "final order of the Board". Disagreements in all the circuits over whether a petition for review qualifies under Section 160(f) center around the

construction of these phrases. In the absence of an opinion Petitioner will show that the dismissal by the Ninth Circuit conflicts with the positions taken by other circuits in interpreting both of these terms.

(I) Is Petitioner a "person aggrieved" within the meaning of Section 160(f)?

The most likely basis for the Ninth Circuit's assertion that they have no jurisdiction is that they believe that Petitioneris not a "person aggrieved" within the meaning of Section 160(f). In a 1942 decision, Anthony v. NLRB, 132 F. 2d 620, the Ninth Circuit held that a workman who had been denied back pay and reinstatement was not a "person aggrieved" within the meaning of Section 160(f) so that the court had no jurisdiction to review the NLRB decision. The Anthony court reasoned that Congress had intended no individual right of action when it enacted the National Labor Relations Act.

In the 35 years since Anthony was decided, it has not been followed by any other circuit. The Seventh Circuit is the only other court to cite Anthony. It was cited and disapproved in Albrecht v. NLRB, 181 F.2d 652,655[1], and cited again and disapproved in Kovach v. NLRB, 229 F.2d 138,142.[2]

In Albrecht (at 654) the Seventh Circuit pointed out the fallacy in reasoning an individual had no right to appeal adverse NLRB actions. Speaking of a House Committee Report[3] upon which the NLRB had relied in arguing no private right of action the court said, "This quotation, however, considered in its relation with the rest of the report, makes it clear that the Committee, when

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1. In Albrecht fired employees brought an unfair labor practice charge against the employer. The NLRB found there was no unfair labor practice and the employees appealed to the Seventh Circuit. The employer intervened to challenge the court's jurisdiction on the premise the employees were not "persons aggrieved".

2. In Kovach an employee had challenged the employer's actions in laying him off. The Board dismissed the complaint. On appeal the company argued that the employee was not a person aggrieved.

3. House Committee Report, 74th Congress, 1st Session, Report No.1147, page 24. "No private right of action is contemplated. Essentially the unfair labor practices listed are matters of public concern, by their nature and consequences, present or potential; the proceeding is in the name of the Board, upon the Board's formal complaint."

it said 'no private right of action is contemplated' was referring to the right to institute an unfair labor practice proceeding, and did not mean that a person aggrieved by a final order of the Board entered at the conclusion of such a proceeding did not have a right to secure judicial review of that final order, as provided by Section 10(f) of the Act."

In Kovach the Seventh Circuit again disapproved of Anthony (at 143), saying, "The Company cites the case of Anthony v. NLRB, 9 Cir., 132 F.2d 620, in support of its argument that Kovach was not an aggrieved party. This court expressed its disapproval of the Anthony case in Albrecht. . .pointing out the fact that it had not been followed by any other Court of Appeals. We note that since the Anthony decision was handed down in 1942, it has not once been cited except with disapproval in the Albrecht case. We still choose not to follow the Anthony case."

As Anthony is a Ninth Circuit decision which has never been disapproved or overruled in the Ninth Circuit, it seems likely that the Anthony precedent would be the most probable grounds for the Ninth Circuit to dismiss Petitioner's case without opinion. As pointed out by

the Seventh Circuit in Kovach, no other circuit has followed Anthony and the Seventh Circuit expressly rejected the holding in Anthony. Anthony seems to represent the precise sort of abberation in the application of Federal law that this court is mandated to resolve.

(II) Was there a "Final Order" of the Board?

In Petitioner's NLRB case, the NLRB decision and order of December 7, 1976 required that Petitioner be reinstated to her position with the Retail Clerks Local 588 and that she be made whole for monetary losses incurred as a result of her termination. After the order, an administrative decision was made by the NLRB Regional Director's office not to press the back pay claim, and, accordingly, after Petitioner was reinstated, a compliance letter was issued closing the case.

To hold that there is no appealable "Final Order" in this situation conflicts in principle with the decision of the Third Circuit Court of Appeals in Leeds and Northrup v. NLRB, 357 F.2d 527 (1966). In Leeds the NLRB Regional Director informally settled an unfair labor practices charge, then withdrew the complaint. When the charging party ap-

pealed the settlement, the NLRB argued the Court of Appeals had no jurisdiction as the action appealed from was not a formal action, so the final order requisite to jurisdiction was absent. The court (at 351) responded that it was illogical to construe Section 160(f) as granting judicial review of formal decisions of the Board, but frustrating judicial review of decisions made by the Board's agents.

"The distinction of formal or informal final disposition under the facts of this case confuses incidence with substance. The absence of a formal order of the Board, which respondent insists is a fatal jurisdictional defect, does not preclude review by this court of a final disposition by an administrative agency."

The D.C. Circuit has also held that informal withdrawal of the complaint by the General Counsel is a reviewable Board action under Section 160(f) in International Ladies Garment Workers, Local 415-475 v. NLRB, 501 F.2d 823 (D.C. Circuit 1974)[4] thereby taking a position in opposition to this decision of the Ninth Circuit.

Both Leeds and Garment Workers can be distinguished from Petitioner's

case on the basis they involved informal action by the General Counsel prior to, and substituting for, formal Board action, whereas Petitioner's case involves General Counsel action after a formal Board order which modified the effect of the order. But the very fact of distinguishing the cases highlights the direct conflict in the reasoning. If a court can review, as a final order of the Board, an informal action of the General Counsel where no formal order is ever entered, then a fortiori, an informal action modifying the effect of a formal Board order, would be reviewable.

(B) IS THERE ANY EXPRESS STATUTORY EXEMPTION TO THE GENERAL POWER OF REVIEW CREATED BY SECTION 160(f)?

This third ground for dismissal is

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4. Petitioner could discover no cases which discuss the "final order" nature of administrative modifications to existing board orders. Perhaps understandable in light of the tenuous logic supporting an argument that there was no final order where the administrative action modified a board order, then the Board finalized it as modified with a compliance letter closing the case. Petitioner has discussed the "final order" argument only because it was suggested as an independent ground for dismissal to the Ninth Circuit and therefore could conceivably have been the basis for their opinion.

the only other possible one after dismissing the two more limited grounds dealt with above which grounds treat controversies surrounding the interpretation of terms used in the statute under discussion. If the Ninth Circuit's dismissal of the Petition for Review was not made on the basis of their interpretation of the statute, then they must have felt that there existed somewhere an express statutory exemption from review. If they did so feel, then their action is in conflict with the decisions of other circuit courts.

A review of the National Labor Relations Act reveals one express statutory exemption which effects the review of Board actions. In 1947, when Congress amended the National Labor Relations Act[5] to create the General Counsel's office, the General Counsel was granted ". . . final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under Section 160 of this title, and in respect of the prosecution of such complaints before the Board. . ." Title 29 U.S.C. Section 153(d).

This language and the surrounding legislative history exempts from judicial review a General Counsel decision not to issue a complaint. Lincourt v. NLRB (First

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5. Labor Management Relations Act, 1947, 61 Stats. 136.

Cir. 170, F.2d 306). However, once a complaint has been filed and the administrative machinery is set in motion, the statutory scheme contemplates Board action which is clearly reviewable under 29 U.S.C. Section 160(f). International Garment Workers Union v. NLRB, supra, 501 F.2d 823. Once a complaint has issued, disposition of the complaint is a Board responsibility and General Counsel actions in the disposition of the complaint are acts as agents of the Board. Leeds and Northrup v. NLRB, supra, Third Circuit.

In Petitioner's case, the complaint had issued, and the Board had issued an order adopting the findings of the administrative law judge. General Counsel then made an administrative decision not to enforce the Petitioner's back pay claim without giving her any hearing whatsoever.

For the Ninth Circuit to dismiss for lack of jurisdiction on the basis that General Counsel's act was exempt from review would clearly conflict with the Garment Workers and Leeds decisions that informal General Counsel acts after the issuing of a complaint are subject to review under Section 160(f).

2. THE NINTH CIRCUIT JURISDICTIONAL DISMISSAL RAISES IMPORTANT QUESTIONS OF STATUTORY CONSTRUCTION IN FEDERAL LABOR LAW.

Petitioner's case illustrates first,

the necessity of judicial review of NLRB administrative actions and second, the importance of Supreme Court guidance on the scope of review granted the federal courts in Section 10(f) of the National Labor Relations Act, Section 160(f) of Title 29 U.S.C.

As to the first point, judicial review of NLRB administrative actions is made necessary because of the enormous power of the General Counsel's office who through personal fiat can determine rights and fashion remedies just as fully as the Board itself. Yet if the Ninth Circuit's dismissal in this case is allowed to stand the decisions of the General Counsel will not be subject to review while those of the Board itself will be subject to review. This unequal application of the law effects potentially every charging party for whom the NLRB issues a complaint.

In this case the administrative decision was made following, and in the enforcement of, an existing Board unfair labor practices order requiring that Petitioner be made whole from all monetary damages. The decision affected Petitioner's rights to back pay just as demonstrably as if she had been denied back pay by the full Board itself. Yet procedurally it was accomplished by administrative decision in the form of a compliance letter, which in the General Counsel's own words, closed

the case.

As a result, Petitioner has been denied any hearing of the question of her right to backpay for the eleven months disallowed by the General Counsel even though she was to have been made whole, according to the decision of the Board for all "earnings or other monetary losses suffered by her". And now the Court of Appeal has dismissed her Petition for Review of that decision without a hearing. The reason that Petitioner has been denied a hearing both at the Board level and before the Court of Appeal is that the denial of back pay was accomplished by administrative decision and not by Board order. (In fact, as has been pointed out, the Board order specifically directed full monetary compensation by way of back pay).

The result is that two orders denying back pay, one by the Board, and one by the General Counsel, are, in effect, subject to different standards of review, even though they are substantively identical in their effect upon the victim of the unfair labor practice.

As to the second point, the importance of Supreme Court guidance in this area; the question of whether Petitioner should be entitled to review of substantive orders made in the form of administrative deci-

sions reaches far beyond Mrs. Robeson herself, and the ambiguity demonstrated by the case at hand demonstrates this potential effect.

By allowing the state of the law surrounding Section 160(f) to remain unclear, the courts give the NLRB a tactical weapon which can be used to divert otherwise arguably valid claims. This is a result of the fact that working persons like Petitioner do not have the resources to engage in drawn out legal disputes to enforce their rights, and any additional procedural skirmishes which must be fought prior to a hearing on the merits will and does tend to discourage persons with only marginal economic ability to finance legal actions from pursuing otherwise good claims.

Petitioner's case is illustrative. Petitioner, the victim of an unfair labor practice, believes the General Counsel was remiss in denying her back pay claim, particularly without a hearing of any sort. In attempting to bring her case before the Ninth Circuit, she was met with a jurisdictional challenge which was possible only because of the unresolved ambiguities surrounding Section 160(f). Petitoner is a working person, a clerk. The jurisdictional challenge created formidable financial barriers to Petitioner's

ever being heard on the merits of her case for back pay. A decision by this court clarifying the scope of Section 160(f) as it relates to informal administrative acts by the General Counsel could eliminate time-consuming, procedural skirmishes and allow efficient disposition on the merits of aggrieved persons' contentions, while removing from General Counsel the temptation to use administrative methods to dispose of close or difficult cases in an attempt to avoid judicial review.

The NLRB is the sole recourse for persons in Petitioner's situation. That statutory scheme is a sensible, efficient means of solving labor disputes when an independent judiciary stands by to review NLRB decisions, as provided in Section 160(f). Where Section 160(f) is construed to deny jurisdiction to review actions of the General Counsel which have the same effect as Board orders, then Petitioner is denied protection from arbitrary or ill-considered substantive decisions of labor law unless he has the financial ability to put forward memoranda in opposition to motions to dismiss and then to review dismissals. Most persons in charging party's position do not have such ability.

CONCLUSION

For these reasons, a writ of certio-

rari should issue to review the order of the Ninth Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GERALDINE ROBESON,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 78-1843

NLRB # 20 CA 10401
San Franciso NLRB

ORDER

Before: GOODWIN and ANDERSON, Circuit Judges.

Upon due consideration, the Court enters the following order:

(a) petitioner's motion for extension of time is granted and petitioner's opposition to the motion to dismiss, heretofore received, is ordered filed; and

(b) the petition is dismissed for lack of jurisdiction.

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U. S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 78-1843

NLRB # 20 CA 10401
San Francisco, CA.

ORDER

Before: GOODWIN and ANDERSON, Circuit Judges.

Upon due consideration, the petition for rehearing is denied.

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GERALDINE ROBESON, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINION BELOW

The order of the court of appeals (Pet. App. 1) is not reported.

JURISDICTION

The order of the court of appeals was entered on October 2, 1978. A timely petition for rehearing was denied on December 18, 1978 (Pet. App. 2). The petition for a writ of certiorari was filed on March 14, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a court of appeals has jurisdiction to review the refusal of the General Counsel of the National

Labor Relations Board to issue a backpay specification and notice of hearing.

STATUTORY PROVISION INVOLVED

Section 10(f) of the National Labor Relations Act, 29 U.S.C. 160(f), provides in pertinent part:

> Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside.

STATEMENT

In an unfair labor practice proceeding under Section 10(c) of the National Labor Relations Act, 29 U.S.C. 160(c), the Board determined that the Retail Clerks Union, Local 588, Retail Clerks International Association, AFL-CIO (hereafter "the Union"), had unlawfully discharged petitioner on June 18, 1975, from her position as an employee of the Union. The Board ordered petitioner's reinstatement with backpay. 227 N.L.R.B. 7 (1976).

Petitioner was reinstated by the Union on January 3, 1977. The Board's Regional Office computed the amount of backpay which was owed by the Union to petitioner in accord with applicable legal principles concerning the backpay claimant's responsibility to

make diligent efforts to find interim employment.[1] Thus, it determined that, because petitioner had merely registered for unemployment and sought referrals through the Union and had made no independent effort to seek interim employment between June 18, 1975, and April 28, 1976, she was not entitled to backpay for that 10-½ month period. The Regional Office concluded that the amount of backpay owed petitioner for the period from May 1976 through January 3, 1977, was approximately $8,000. The Union paid petitioner this sum and also posted the notice prescribed by the Board's order for the requisite period of time. On May 31, 1977, the Regional Director determined that the Union was in full compliance with the Board's order, and notified petitioner that the case was closed.

On May 28, 1977, petitioner requested the Regional Director to review the backpay computations and the decision to close the case (Supp. Pet. App. B). On July 18, 1977, the Regional Director denied the request, explaining that the General Counsel would "be unable to prevail on the claimant's behalf in the course of backpay litigation" if a larger amount of backpay

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[1] A discriminatee is not entitled to backpay for periods in which he fails to search diligently for alternative work following an unlawful discharge. See *NLRB* v. *Mastro Plastics Corp.*, 354 F. 2d 170, 174 n.3 (2d Cir. 1965), cert. denied, 384 U.S. 972 (1966); *NLRB* v. *Miami Coca-Cola Bottling Co.*, 360 F. 2d 569, 575 (5th Cir. 1966). See also *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 198, 199-200 (1941) (since only actual losses may be compensated for, a discriminatee's gross backpay should be reduced "for losses which he willfully incurred" and for "clearly unjustifiable refusal to take desirable new employment").

was demanded from the Union (Supp. Pet. App. C).[2] On August 6, 1977, petitioner appealed this decision to the General Counsel (Supp. Pet. App. D). After investigation of the matter, the General Counsel's Office denied petitioner's appeal for reasons similar to those stated in the Regional Director's letter (Supp. Pet. Apps. E, F). On January 11, 1978, the Regional Director denied petitioner's request to issue a backpay specification, in order to initiate formal backpay proceedings (Supp. Pet. App. H).[3]

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[2]The Regional Director stated (Supp. Pet. App. C):

> As the Region's Compliance Officer explained to you, we must be able to prove that a backpay claimant remained in the labor market and exercised requisite diligence in seeking interim employment at all times during his or her backpay period. The standards imposed by the Board, as approved by courts require more than mere registration at state unemployment offices and/or union registration facilities. A backpay claimant also must make independent efforts to find employment after being discharged. Failing this it cannot be said the claimant was sufficiently diligent with respect to his or her efforts to secure employment. In these circumstances we should be unable to prevail on the claimant's behalf in the course of backpay litigation due to well settled law that backpay cannot be computed for times when employment is not more actively sought than merely by placing one's name on registration lists.

[3]The Board's Rules and Regulations provide in part (29 C.F.R. 102.52):

> After the entry of a Board order directing the payment of back pay or the entry of a court decree enforcing such a Board order, if it appears to the regional director that a controversy exists between the Board and a respondent concerning the amount of back pay due which cannot be resolved without a formal proceeding, the regional director may issue and serve upon all parties a back-pay specification in the name of the Board. The specification shall contain or

Thereafter, petitioner filed a petition for review of the Regional Director's refusal to issue a backpay specification in the court of appeals. The court granted the Board's motion to dismiss for lack of jurisdiction. (Pet. App. 1).

ARGUMENT

The decision of the court of appeals is correct and in accord with established principles, and there is no conflict of decisions. Review by this Court is unwarranted.

1. Section 10(f) of the National Labor Relations Act provides that "[a]ny person aggrieved by a final order of the Board" may petition for review in an appropriate court of appeals. As this Court has held, a "final order" is one entered by the Board at the culmination of a formal proceeding conducted under Section 10(c) of the Act. *American Federation of Labor* v. *NLRB*, 308 U.S. 401, 409 (1940).

The determination by the Regional Director, acting as a representative of the General Counsel,[4] that the Union had fully complied with the Board's order and that issuance of a backpay specification and notice of hearing was not warranted, is not a "final order" within the meaning of the Act. Rather this decision reflects an administrative determination that, in light of

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> be accompanied by a notice of hearing before an administrative law judge at a place therein fixed and at a time not less than 15 days after the service of the specification.

[4]Section 3(d) of the Act, 29 U.S.C. 153(d), vests the General Counsel with "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10." As shown *infra*, the issuance of a backpay specification is analogous to the issuance of a complaint because it triggers a supplemental proceeding under Section 10.

the applicable legal principles, the General Counsel could not prevail, if a formal backpay proceeding were instituted, on petitioner's contention that she was entitled to backpay for the entire period between her discharge and her reinstatement, because for part of the period she had not made a reasonably diligent effort to secure interim employment.[5] Thus, this decision—made on the basis of an evaluation of the potential strengths and weaknesses of the General Counsel's case—is analogous to the General Counsel's decision not to issue an unfair labor practice complaint. The courts of appeals have consistently held that the General Counsel's determination not to issue an unfair labor practice complaint is not a final order of the Board and hence is not reviewable in the courts of appeals under Section 10(f). See *Lincourt* v. *NLRB*, 170 F. 2d 306 (1st Cir. 1948); *General Drivers, Chauffeurs, and Helpers, Local 886, AFL-CIO* v. *NLRB*, 179 F. 2d 492 (10th Cir. 1950); *Manhattan Construction Co.* v. *NLRB*, 198 F. 2d 320 (10th Cir. 1952); *Newspaper Guild, Erie Newspaper Guild, Local 187* v. *NLRB*, 489 F. 2d 416, 426 (3d Cir. 1973). These holdings are in accord with this Court's recognition that the General Counsel's discretion to

[5]Petitioner has not disputed the Regional Director's determination that for more than 10 months during the backpay period petitioner made no independent effort to obtain interim employment. Petitioner did contend (Supp. Pet. App. D), however, that her failure to search for employment should not serve as a basis for denying her backpay because the Region never notified her of her obligation to look for interim employment. The General Counsel properly determined (Supp. Pet. App. F) that the failure of the Regional Office to notify a discriminatee of the obligation under the law to make a reasonable search for interim employment does not relieve the discriminatee of that obligation. See *Phelps Dodge Corp.* v. *NLRB, supra*, 313 U.S. at 199-200.

issue unfair labor practice complaints is unreviewable. See *Detroit Edison Co.* v. *NLRB*, No. 77-968 (Mar. 5, 1979), slip op. 14; *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 138 (1975); *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967).

As the Court stated in *NLRB* v. *Sears, Roebuck & Co., supra*, 421 U.S. at 138-139:

> Congress has delegated to the Office of General Counsel, "on behalf of the Board" the unreviewable authority to determine whether a complaint shall be filed. 29 U.S.C. §153(d); *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967). In those cases in which he decides that a complaint shall issue, the General Counsel becomes an advocate before the Board in support of the complaint. In those cases in which he decides not to issue a complaint, no proceeding before the Board occurs at all. The practical effect of this administrative scheme is that a party believing himself the victim of an unfair labor practice can obtain neither adjudication nor remedy under the labor statute without first persuading the Office of General Counsel that his claim is sufficiently meritorious to warrant Board consideration.

Similarly, in backpay proceedings, the General Counsel functions as an advocate before the Board on behalf of the backpay claimant and thus, before initiating proceedings, must have reasonable cause to believe that the claim for backpay is meritorious.[6] Section 10(f)

[6]After a backpay specification is issued by the Regional Director, a hearing is held before an administrative law judge, whose decision is subject to review by the Board. A Board decision and order in a backpay proceeding, as distinguished from

does not make this prosecutorial determination by the General Counsel reviewable.[7]

2. The decisions in both *Leeds & Northrup Co.* v. *NLRB*, 357 F. 2d 527 (3d Cir. 1966) and *International Ladies' Garment Workers Union, Local 415-475, AFL-CIO* v. *NLRB*, 501 F. 2d 823 (D.C. Cir. 1974), relied upon by petitioner (Pet. 14), are distinguishable. In both of those cases, the courts found jurisdiction under Section 10(f) to consider certain objections raised by the charging party to an informal settlement agreement entered into by the General Counsel and the charged party subsequent to the issuance of an unfair labor practice complaint. Both courts recognized that the General Counsel's decision not to issue a complaint is unreviewable. See *Leeds & Northrup Co. supra*, 357 F. 2d at 534; *International Ladies' Garment Workers Union, Local 415-475* v. *NLRB, supra*, 501 F. 2d at 830-831. The determinative factor in both cases was the fact that the General Counsel had issued unfair labor practice complaints prior to entering into the

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the General Counsel's decision to institute such a proceeding, is reviewable under Section 10(f) of the Act. See, e.g., *NLRB* v. *Mastro Plastics Corp.*, 354 F. 2d 170, 174 (2d Cir. 1965), cert. denied, 384 U.S. 972 (1966).

[7]Contrary to petitioner's claim (Pet. 7), it is not "likely" that the Ninth Circuit dismissed the petition for review on the basis that petitioner was not a "person aggrieved" within the meaning of Section 10(f) of the Act. The Board did not urge that position in the court of appeals, but rather contended that the Regional Director's determination not to issue a backpay specification was not a final order within the meaning of Section 10(f). In any event, the court lacked jurisdiction because of the lack of a final order. This was true, too, in *Anthony* v. *NLRB*, 132 F. 2d 620 (9th Cir. 1942), where the "order" sought to be reviewed was the Board's refusal to issue a complaint. (Under the Wagner Act, the complaint power was lodged in the Board.)

settlement agreements. In the present case, unlike *Leeds & Northrup* and *ILGWU*, petitioner seeks review not of a post-complaint settlement, but of the determination that there was an insufficient legal and factual basis to issue a backpay specification and thereby initiate proceedings to obtain backpay for the entire backpay period.[8]

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[8]Contrary to petitioner's contention (Pet. 14), the fact that the General Counsel originally issued a complaint charging the Union with violating Section 8(a)(1) and (3) of the Act, 29 U.S.C. 158(a)(1) and (3), does not bring this case within the terms of *Leeds & Northrup* or *ILGWU*. While the underlying discriminatory discharge case established the Union's commission of an unfair labor practice and its backpay obligation, the proceeding to determine the extent of the backpay liability is essentially a separate proceeding to resolve distinct issues, and therefore requires that the General Counsel evaluate a wholly new set of factual and legal issues in determining whether to proceed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JOHN S. IRVING
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
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National Labor Relations Board

MAY 1979

DOJ-1979-05

FILED
APR 20 1979
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978

No. 78-1414

GERALDINE ROBESON, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent

SUPPLEMENTAL APPENDIX
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM H. KELLER
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Attorneys at Law
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Woodland, CA 95695

916/666-1917

April 17, 1979

Docket #78-1414

SUPPLEMENTAL APPENDIX

Attachment #

Decision and Order.....A

Letter of May 28, 1977 from Geraldine Robeson to Regional Director.....B

Letter of July 18, 1977 from Regional Director to Geraldine Robeson.....C

Letter of August 6, 1977 from Geraldine Robeson to General Counsel.....D

Letter of September 12, 1977 from Deputy Asst. General Counsel to Geraldine Robeson.....E

Letter of November 14, 1977 from Deputy Asst. General Counsel to Geraldine Robeson.....F

Letter of January 4, 1978 from attorney William H. Keller to Regional Director.....G

Letter of January 11, 1978 from Regional Director to attorney William H. Keller.....H

-oOo-

MJW

227 NLRB No. 2

D-1841
Sacramento, Calif.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

RETAIL CLERKS UNION, LOCAL 588,
RETAIL CLERKS INTERNATIONAL
ASSOCIATION, AFL-CIO

and

Case 20-CA-10401

GERALDINE ROBESON, an Individual

DECISION AND ORDER

On August 27, 1976, Administrative Law Judge James T. Rasbury issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief, and the General Counsel and Charging Party filed briefs in support of the Administrative Law Judge's decision.

Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order as modified herein.[2]

1/ The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. Standard Dry Wall Products, Inc., 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

Although the Administrative Law Judge found that the Respondent had violated Sec. 8(a)(1), he failed to enter the broad order that is part of the appropriate remedy for this unfair labor practice. We therefore substitute the attached notice for that of the Administrative Law Judge.

2/ Since the Administrative Law Judge's findings clearly establish that the Respondent had violated Sec. 8(a)(1) of the Act by discharging Geraldine Robeson, and since the remedy he proposed would be the same in any event, we find it unnecessary to rule upon his finding that the Respondent had also violated Sec. 8(a)(3) by the same conduct. Member Jenkins would adopt the Administrative Law Judge's finding that the Respondent violated Sec. 8(a)(3) by discharging Robeson.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge as modified below, and hereby orders that the Respondent, Retail Clerks Union, Local 588, Retail Clerks International Association, AFL-CIO, its officers, agents, and representatives, shall take the action set forth in the recommended Order as so modified:

1. Substitute the following for paragraph 1(b):

"(b) In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them in Section 7 of the Act."

2. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C. December 7, 1976

Betty Southard Murphy, Chairman

Howard Jenkins, Jr., Member

Peter D. Walther, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which parties had the opportunity to give evidence, it has been decided that we, Retail Clerks Union, Local 588, Retail Clerks International Association, AFL-CIO, have violated the National Labor Relations Act and we have been ordered to post this notice. We intend to abide by the following:

WE WILL offer full and immediate reinstatement to Geraldine Robeson without prejudice to her seniority or other rights and privileges, dismissing, if necessary any employee hired subsequent to the day she was wrongfully discharged.

WE WILL make Geraldine Robeson whole for any loss in wages she may have suffered as a result of her wrongful discharge, including all regularly paid employee benefits such as insurance, pensions, and vacations.

WE WILL NOT discharge Geraldine Robeson, or any other employee, for engaging in protected concerted activity intended to improve the wages and other working conditions of our clerical employees.

D-1841

APPENDIX (continued)

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their Section 7 rights as set forth in the National Labor Relations Act.

RETAIL CLERKS UNION, LOCAL 588
RETAIL CLERKS INTERNATIONAL
ASSOCIATION, AFL-CIO
(Employer)

Dated_____ By_____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 13018 Federal Building Box 36047, 450 Golden Gate Avenue, San Francisco, California 94102, Telephone 415/556-0335.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

RETAIL CLERKS UNION, LOCAL 588,
RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO

and Case No. 20-CA-10401

GERALDINE ROBESON, An Individual

Bernard T. Hopkins, Esq., counsel for the General Counsel.
Robert Cowell, Esq., counsel for the Respondent Union.
William H. Keller, Esq., counsel for the Charging Party.

DECISION

Statement of the Case

JAMES T. RASBURY, Administrative Law Judge: This matter was heard in Sacramento, California on April 29 and 30, and May 3, 1976 based on a charge filed on July 8, 1975 by Geraldine Robeson, an individual, against her employer, the Retail Clerks Union, Local 588, Retail Clerks International Association, AFL-CIO (herein Employer or Respondent Employer), alleging wrongful termination because of her protected concerted activity. On February 20, 1976 a complaint issued alleging the Employer to have violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, 29 U.S.C., Sec. 151, et seq., hereinafter called the Act. The Respondent's answer acknowledged the requisite jurisdictional data

and the supervisory and agency status of Ralph Williams, president of the Employer, but denied that Robeson had been terminated because she engaged in protected activities in violation of the Act as alleged.

Helpful briefs were received from the General Counsel, the Charging Party's counsel and the Respondent Employer. These have been carefully considered and weighed and after due consideration of the entire record and the exhibits received, I make the following:

Findings of Fact

I. Jurisdiction

Respondent is, and at all times material herein has been, a labor organization affiliated with the Retail Clerks International Association, AFL-CIO, with its principal place of business in Sacramento, California, where it is engaged in organizing unrepresented employees and in representing its members and other employees in collective bargaining with various employers concerning wages, hours, and other terms and conditions of employment. During the past calendar year, in the course and conduct of its operations, Respondent Employer received gross income in excess of $500,000, of which an amount in excess of $50,000 was remitted to the Retail Clerks International Association in Washington, D.C. During the past calendar year Employer maintained collective-bargaining agreements with Raley's, Inc., and Safeway Stores, Inc., each of whom received gross revenues in excess of $500,000 and purchased products valued in excess of $50,000 from suppliers located outside the State of California or from suppliers from within the State of California who obtained such products from outside the State of California. On the basis of these admitted facts, I find the Respondent Employer is, and at all times material has been, an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Issues

1. What was the true motivating factor causing the discharge of Geraldine Robeson?

2. Were Robeson's activities of the type falling within the protection of the Act?

3. Has Robeson's conduct - either before or after her discharge - been such as to deny her reinstatement or backpay?

III. The Alleged Unfair Labor Practices

A. The Evidence

Geraldine Robeson was first employed as an office clerical employee by Respondent Employer in 1964 and remained so employed until June 18, 1975. 1/ At all times material herein Robeson's immediate superior was Rose Parino, the office manager, who in turn reported to Ralph Williams, president and chief executive officer of Respondent Employer. The employees are not represented by a collective-bargaining agent and there is no requirement to be a member of any union, although Robeson has at all times during her employment been a member of Retail Clerks Local 588.

Robeson testified that when she was initially hired by James Alexander, the then chief executive officer of the Respondent Employer, she was advised that her rate of pay would always be that of a journeyman food clerk, a classification of employee represented by the Union (the Employer) in the retail food industry. During the first 4 years of her employment, Robeson was so paid, but in 1968 Ralph Williams became the Employer's chief executive officer and he instituted changes in the wage structure for the office personnel. The office

1/ Most of the relevant and significant events to be discussed and considered herein occurred during the year 1975 and, unless otherwise indicated, all dates hereinafter shall be in the year 1975.

wage rates were made uniform and a reduction in weekly hours from 40 to 35 hours occurred. Although the hours were reduced, the office employees nevertheless continued to receive the same weekly wage rate as they had received for the 40-hour week, thus making their hourly rate substantially higher than the hourly rate received by the journeyman food clerks. In 1971 the office employees received an hourly wage increase, causing their rate to be comparable to the journeyman food clerks (who had received an increase pursuant to negotiations between this Employer and the retail food employers); however, there was a substantial difference in the take-home pay because the journeyman food clerks were working a 40-hour week while the office employees of the Respondent Employer were only working a 35-hour workweek.

It was this difference in take-home pay and the knowledge that the Employer's business agents were still being paid in accordance with the manager's rate as set forth in the food employers' contract that caused employees Elaine Keech, Thelma Hammitt and Geraldine Robeson to meet at Keech's home to discuss and consider what course of action they might take toward enhancing their take-home pay. The employees decided to discuss the matter with Office Manager Rose Parino, and on February 14, 1974 this was done. 2/ Mrs. Parino took the employees' request for a change in pay to Mr. Williams, who in turn considered the matter with the Union's executive board at their February

2/ There is some insignificant conflict as to whether the employees wanted to work the additional 5 hours per week and thus have the same take-home pay, or whether they wanted to have their hourly rate increased so that they would have the same take-home pay as the journeyman food clerks but only work 35 hours. I regard this minor conflict in the evidence as unimportant, because regardless of the individual solution desired or proposed by each of the employees, their conduct amounted to concerted activity for the purpose of increasing their take-home wages.

meeting. 3/ No change in pay resulted from this effort.

On March 7, 1974 Robeson appeared before the Employer's executive board to voice her complaints regarding the difference in pay between the journeyman food clerks and the Employer's office clericals (see Charging Party's Exhibit No. 1 for a comparison of the hourly rates of the food clerks and the office clericals as well as the weekly and annual differences in take-home pay during the period from 1965 through 1974). At this meeting Robeson was informed by Williams that membership in the Union was not a condition of employment and offered her a withdrawal card. In rejecting her request for an increase in take-home pay, Robeson was advised that anyone who was dissatisfied with the working conditions in the office could seek employment elsewhere.

On August 8, 1974 Robeson appealed what she considered to be a discriminatory wage reduction by the Employer to the Employer's international organization, the Retail Clerks International Association, AFL-CIO (General Counsel's Exhibit No. 2). On October 22, 1974 Respondent's international president replied to the Charging Party, upholding the Employer's position (General Counsel's Exhibit No. 3). On November 5, 1974 Robeson again wrote Respondent's international president protesting the continued loss of the 5 hours' difference in take-home pay and what she believed to be generally discriminatory conduct toward the women office clericals of the Employer (General Counsel's Exhibit No.4).

3/ There was evidence introduced that on February 21, the morning following the executive board meeting, Williams told Robeson that she was being relieved of her duties of preparing the news column submitted to the union newspaper for publication to all union members. I have tended to totally ignore this incident because the Employer had a right to change the duties of the employees and because its reason for doing so is a logical one. Even as background evidence this incident in no way reflects discriminatory conduct under the Act.

As indicated earlier, the charge in this case was filed on July 8, 1975 and all of the above-related activity serves only as background for the relevant events occurring in 1975. On May 7, Mrs. Robeson appeared before the Union's executive board, but departed without explaining her reason for appearing at the meeting. According to the evidence, Mrs. Robeson had appeared in order to ask questions concerning matters she did not understand, but became disturbed at the tone of voice used by Mr. Williams when she asked why the executive board had gone into "executive session," thereby excluding Elaine Keech from the meeting. The next evening at a general membership meeting of the Union, Robeson spoke from the floor and questioned the Employer's officers as to why the male business agents had been given a cost-of-living increase and the female office workers had not received a similar cost-of-living increase. She was informed by Williams that the executive board felt that the office workers were adequately compensated and those who were unhappy might seek employment elsewhere and should do so since some of them appeared to be dissatisfied (see Respondent's Exhibit No. 3).

The following morning Robeson engaged in a conversation with Paul Frazelle, a former business representative, currently retired as of January 1, 1976, wherein Frazelle related that in response to a question from him, Robeson stated that Williams was wrong, "the whole operation is wrong. And we will destroy the wrong. And he will be destroyed with it." According to Frazelle in this conversation Robeson threatened to run for office against Williams if necessary. Robeson denied that she said she was trying to destroy Williams, but only said she wanted to destroy the wrongs that are created by discrimination.

On June 5, Robeson gave a speech before the Coalition of Labor Union Women in Sacramento, an organization composed of activist women who are union members. The speech not only told of the problems encountered by Mrs. Robeson and the other female office clericals with her employer, but was

critical of Williams as an employer and a union leader. The general tenor of Robeson's remarks was that his conduct as an employer was inconsistent with the principles to which he was obligated as a union leader. (See General Counsel's Exhibit No. 5 for copy of the speech.) Following the speech there was a question-and-answer period and Robeson testified that Rose Parino acknowledged that the substantive content of the speech was true and this statement by Robeson was not denied during the course of Rose Parino's testimony.

The following morning Parino requested a copy of Robeson's speech for Mr. Williams, but Robeson said she was not interested in giving him a copy as it was something she had done on her own time. Some time during the following week Williams personally requested a copy of the speech, at which time Robeson told him that she was not giving out copies of the speech as it was not done for the Union or on union time.

The official reporter for the membership meetings was Rose Parino, who took notes in longhand and then usually dictated them to one of the stenographers, frequently Mrs. Robeson. This procedure was followed for the May 8 general membership meeting at which it has heretofore been indicated Robeson raised the question concerning the cost-of-living increase for the business agents but none for the office clerical employees. Apparently there was no rush in the typing of the minutes and Mrs. Robeson did not transcribe her shorthand notes until June 9 in order for them to be ready for approval at the membership meeting to be held on June 12. This procedure frequently resulted in one or more rough drafts being prepared by Mrs. Robeson before she presented the minutes to Mrs. Parino for her approval, who in turn might make further corrections. After typing the final corrected version of the minutes to be submitted to the membership, Robeson went to the photocopy machine to make a copy for herself, inasmuch as she was personally involved in what had transpired at the May 8 meeting and was quoted in the

minutes (see Respondent's Exhibit No. 3). Rose Parino saw Robeson at the photocopy machine and asked what she was doing. Parino told Robeson that she was not allowed to have copies of her (Parino's) minutes. Robeson expressed some surprise and said that she had been permitted to keep a copy of earlier minutes when she had been involved in relevant conversation as reflected in the minutes at the meeting in 1974. This conversation resulted in Parino becoming slightly upset and expressing the fact that she felt her honesty was being questioned by Robeson.

The events which followed immediately thereafter are rather bizarre. Robeson testified that her usual practice was to destroy or dispose of each rough draft as she sought to obtain a satisfactory copy. On Wednesday morning, June 11, Robeson opened her desk drawer where she saw one of the earlier rough draft copies of the minutes. This surprised her as it had been her custom to throw the discarded rough drafts into the wastebasket, which she proceeded to do with this particular copy. Later, she removed this rough draft copy from the wastebasket so that she could take the rough draft with her during the lunch hour and read it in order to review the remarks attributed to her. When the Charging Party returned from lunch, Williams and Parino asked her where the rough draft was, to which she replied it was in her car. They asked her to get the rough draft, which she did, and returned it to them. Williams asked Parino to write this instance up, to which Robeson objected because she had no knowledge of any rule which she might have violated. Elaine Keech also testified that she had no knowledge of any such rule which would have prevented Robeson from removing the rough draft copy of the minutes from the office.

Parino admitted that she was intentionally snooping at the time she looked in Robeson's desk and saw the rough draft copy in the center drawer. She testified that she first discovered this rough draft copy in Robeson's desk on either the evening of June 9

or the morning of June 10, but said nothing to Robeson. Parino further acknowledged that when she discovered the rough draft to be missing on June 11 she reported the incident to Williams without awaiting an explanation from Robeson concerning the rough draft. The chain of events strikes me as being most unusual and in view of my belief that Robeson was an honest and candid witness, I am disposed to feel that someone "set her up."

On June 17 Williams instructed Parino to seek a stenographic replacement who came to work on June 18. At about 4 p.m. in the afternoon on June 18 Williams advised Robeson she was being discharged immediately. Before Williams could explain further, Robeson abruptly stood up and left. Williams testified that he attempted to tell her the reason for her discharge, which at the hearing Respondent contended was misconduct and insubordination, but all that he was able to relate to her was that she was being discharged "for the good of the Union."

B. Respondent's Arguments

Respondent contends that Mrs. Parino announced to Williams that she intended to resign on either June 12 or 13, after nearly 19 years of employment with the Union, because she could not take any more of the constant harassment which she believed stemmed from Mrs. Robeson. Williams told Parino to consider the matter further over the weekend and they would discuss her possible resignation the following week. The following Monday, June 16, Williams learned of the conversation between Frazelle and Robeson (which has heretofore been set forth) wherein there is some conflict as to whether Robeson said she wanted to destroy the wrongs created by the discrimination or whether she said Williams was wrong and she would destroy him. Following these events, Williams consulted with his labor attorney, seeking advice regarding the possible discharge of Robeson and was told that he could properly discharge her for misconduct and insubordination. It was on June 17 that he then asked Parino to obtain some extra stenographic help and on June 18 advised Robeson that she was being terminated.

Respondent argues first that the General Counsel has (1) failed to show by a preponderance of the evidence that Robeson's discharge was unlawfully motivated; (2) that Robeson's conduct was neither concerted protected activity nor activity on behalf of, or in the interest of, a labor organization; (3) and finally, the Employer was justified in discharging Robeson because of her own misconduct and the Board is without authority to substitute its judgment for the Employer's as to what constitutes reasonable grounds for discharge. Finally, the Respondent argues that even if it be determined that Robeson was discharged in violation of the Act, she should not be ordered reinstated to her job because she has engaged in egregious conduct toward her employer by disparaging the Employer's business (Firehouse Restarant, 220 NLRB No. 135, 1975). The alleged egregious conduct toward the Employer by Robeson stems from the picketing of the Employer's offices and the distribution by Mrs. Robeson of two handbills which appear in the record as Respondent's Exhibits Nos. 1 and 2.

Analysis

A resolution of this case to a large extent depends on the resolution of the credibility of the various witnesses. I find Geraldine Robeson to be an enthusiastic, oftentimes overly zealous and a naive person, but entirely sincere and honest in her beliefs and testimony. Her testimony is to be credited. Robeson's difficulties in her employment began in 1974, when she and two other office clerical employees, acting in concert, decided to seek restoration of their take-home pay on a basis comparable with the journeymen food clerks. While the other two employees were not so determined in their presentation to the various levels of the Employer's management, nevertheless I am convinced from all of the testimony and evidence presented to me that her conduct was on behalf of all the office clericals and was of a protected concerted nature. The absence of any outward manifestation of support for her efforts is not sufficient to establish that Respondent's employees did

not share her interest or support her efforts to increase the wages. 4/ While Mrs. Robeson's initial efforts were outside of the 10(b) period, 5/ her efforts to speak out on the alleged discriminatory conduct of the Employer in granting a cost-of-living wage increase to the business agents while failing to do so for the office clericals was a continuation of this same effort to improve the wages of the women office workers.

The Supreme Court has held that employees of a union have the same right as any other employees and when an employing union discharges an employee for protected concerted activities it violates the Act. 6/ The critical question is whether Robeson acted in good faith on behalf of herself and her fellow office clerical employees for the rights she felt they were all entitled to. In my opinion the record supports the conclusion that Robeson was at all times acting in good faith and that her conduct falls within the limits of concerted activity as set forth in Section 7 of the Act.

It seems incredible that after 10 years of employment without one single word, either oral or written, in the nature of a reprimand regarding the quantity or quality of Robeson's work, that she should suddenly become a disruptive employee, guilty of misconduct and insubordination. I find the Respondent Employer's alleged reason for her discharge to be a pretext. In my opinion, based on all the evidence, the true motivating force causing the discharge of Geraldine Robeson was her persistence in speaking out on behalf of the women clericals in an

4/ Alleluia Cushion Co., Inc., 221 NLRB No. 162.

5/ The relevant portion of 10(b) reads as follows: "Provided, that no complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . . ."

6/ Office Employees Union v. N.L.R.B., 353 U.S. 313, 1957.

effort to raise their wages and to correct what she believed to be discriminatory wage policies as between the business agents and the office clericals. I have carefully considered Robeson's conduct and testimony as she appeared before me on 3 days as well as the contents of Respondent's Exhibits 1 and 2, which are pamphlets that Robeson distributed after her discharge, and I can find nothing there which I believe to be offensive, defamatory and so opprobrious as to remove her conduct from the protection of the Act.

Respondent's counsel's reliance on N.L.R.B. v. Ogle Protection Service, 149 NLRB 545, 375 F.2d 497 (C.A. 6, 1967), cert. den. 389 U.S. 843, is misplaced. While the principles enunciated in that case are valid, the particular case turned on the resolution of the true motive for the discharge which the Administrative Law Judge and the Board found to have been for valid reasons not protected by the Act. (I.e., good cause. One of the dischargees was fired for drinking on the job and the other for failure to perform his duties. Both were relatively short-term employees.) In the instant case, while it is recognized that all employees must be amenable to the instructions and orders of the employer, nevertheless, when the record fails to reveal a single instance of reprimand or criticism over a 10-year period, a sudden discharge for a reason expressed as "for the good of the union" (this must be translated as: "for the good of the employer") is worthy of microscopic inspection. I have examined all of the evidence carefully, based on the logic of probability under all the circumstances it seems reasonable to infer that Respondent's real reason for discharging Robeson was her persistence in seeking a wage adjustment for the office clericals.

The Robeson bulletin of March 28, 1976 makes no direct accusations that either Williams or the Respondent was responsible for the threat on her son's life, but merely sets forth the facts of the threat and then suggests that it could have occurred because of her dispute with the labor union involved. In Blue Jeans Corporation, 170 NLRB 1425, the Board held that an employee who had threatened to "kill the SOB" who had informed the employer that she was solic-

iting for the union and threatened a supervisor with a pair of scissors, would not forfeit her right to reinstatement, since her misconduct was provoked by her employer's unfair labor practices. In so holding, the Board quoted in part from N.L.R.B. v. M & B Headwear Co., Inc., 349 F.2d 170 (C.A. 4, 1965), as follows: "An employer cannot provoke an employee to the point where she commits such an indiscretion as is shown here and then rely on this to terminate her employment . . . . The more extreme an employer's wrongful provocation, the greater would be the employee's justified sense of indignation and the more likely its excessive expression. To accept the argument addressed to us by the Company would be to provide employers a method of immunizing themselves from the real sanction of Section 8(a)(3) . . . . (R)efusal to reinstate her would put a premium on the employer's misconduct." After a careful examination of all of the evidence, I find nothing in this case so flagrant as to render Robeson unfit for further service or to excuse the Respondent from its obligation toward this wrongfully discharged employee. 7/

IV. Conclusions of Law

1. The Respondent Employer, Retail Clerks Union, Local 588, Retail Clerks International Association, AFL-CIO, is an employer engaged in commerce within the meaning of Section 2(2) and (6) of the Act.

2. By discharging Geraldine Robeson on June 18, 1975 because she was actively and concertedly seeking to improve the wages and working conditions of the office clericals, Respondent has interfered with Robeson's Section 7 rights of the Act and thereby violated Section 8(a)(1) and (3) of the Act.

3. The aforesaid unfair labor practice is an unfair labor practice within the meaning of Section 2(6) and (7) of the Act.

7/ O'Daniel Oldsmobile, Inc., 179 NLRB 398.

V. The Remedy

Having found that Respondent engaged in, and is engaging in certain unfair labor practices, it will be recommended that it cease and desist therefrom and take certain affirmative action necessary to effectuate the policies of the Act.

Respondent unlawfully discharged Geraldine Robeson in violation of Section 8(a)(1) and (3) of the Act and it will be recommended that Respondent offer her immediate and full reinstatement to her former or substantially equivalent position, without prejudice to her seniority or other rights and privileges and to make her whole for any loss of earnings or any other monetary losses she may have suffered as a result of such discrimination from the date of her discharge until reinstated. Any backpay will be determined in accordance with the formula set forth in F. W. Woolworth Company, 90 NLRB 289, and Isis Plumbing & Heating Co., 138 NLRB 716.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended: 8/

ORDER

The Respondent, Retail Clerks Union, Local 588, Retail Clerks International Association, AFL-CIO, its officers, agents, successors and assigns, shall:

8/ In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

1. Cease and desist from:

(a) Discharging Geraldine Robeson, or any other employee, for engaging in protected concerted activity intended to improve the wages of the office clericals employed by Respondent.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer to Geraldine Robeson immediate and full reinstatement to her former or substantially equivalent position without prejudice to her seniority or other rights and privileges and make her whole for any loss of earnings or other monetary losses suffered by her in the manner set forth in the section above entitled "The Remedy."

(b) Preserve and upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and all other records necessary for determination of the amount of backpay due and the right of reinstatement under the terms of this Order.

(c) Post at its principal office in the city of Sacramento, California, on the bulletin board, and all such other places as the usual notices to employees are posted, copies of the attached notice marked "Appendix." 9/ Copies

9/ In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

of such notices on forms provided by the Regional Director for Region 20, after being signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated: AUG 27 1976

James T. Rasbury
Administrative Law Judge

FORM NLRB-4727

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

AFTER A TRIAL AT WHICH PARTIES HAD THE OPPORTUNITY TO GIVE EVIDENCE, IT HAS BEEN DECIDED THAT WE, RETAIL CLERKS UNION, LOCAL 588, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, HAVE VIOLATED THE NATIONAL LABOR RELATIONS ACT AND WE HAVE BEEN ORDERED TO POST THIS NOTICE.

WE WILL offer full and immediate reinstatement to Geraldine Robeson without prejudice to her seniority or other rights and privileges, dismissing, if necessary any employee hired subsequent to the day she was wrongfully discharged.

WE WILL make Geraldine Robeson whole for any loss in wages she may have suffered as a result of her wrongful discharge including all regularly paid employee benefits such as insurance, pensions and vacations.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their Section 7 rights as set forth in the National Labor Relations Act.

RETAIL CLERKS UNION, LOCAL 588,
RETAIL CLERKS INTERNATIONAL
ASSOCIATION, AFL-CIO
(Employer)

Dated_____ By_____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 13018 Federal Building Box 36047, 450 Golden Gate Ave., San Francisco, California, 94102. Telephone Number: (415) 556-0335

8425 Hastings Court
Sacramento, CA 95826
May 28, 1977

Natalie Allen, Regional Director
National Labor Relations Board, Region 20
450 Golden Gate Avenue, Box 36047
San Francisco, CA 94102

RE: CASE NO. 20-CA-10401

Dear Ms. Allen:

I am writing to appeal the decision of compliance officer Shirley Bingham to toll my backpay from 6/19/75 through 4/30/76 for an infraction I was totally unaware of until she wrote me on 4/28/76, and after which I did comply.

Her decision seems in direct contravention to the spirit of Judge James T. Rasbury's decision:

> "It will be recommended that the Union offer Geraldine Robeson immediate and full reinstatement to her former or substantially equivalent position ... and to make her whole for any loss of earnings or any other monetary losses she may have suffered as a result of such discrimination from date of discharge until reinstated."

Further, he concluded his analysis as follows:

> "I find nothing in this case so flagrant as to render Robeson unfit for further service or to excuse the Respondent Union from its obligation toward this wrongfully discharged employee."

If the decision to toll is upheld, it would seem that the N.L.R.B. is, inadvertently, compounding the wrongdoing and rewarding the wrongdoer by depriving me of 10 months' backpay and fringe benefits for a technicality unknown to me.

I request that her decision be carefully reviewed, due to the extenuating circumstances surrounding it, and reversed so that the just intent of Judge Rasbury's decision can prevail.

My appreciation for your consideration and helpfulness in this matter.

Sincerely yours,

Geraldine Robeson

Geraldine Robeson, Member
Retail Clerks Union Local 588

Attachment B

NATIONAL LABOR RELATIONS BOARD
REGION 20
450 Golden Gate Avenue, Box 36047
San Francisco, California 94102
Telephone 556-6721
Area Code 415

July 18, 1977

Ms. Geraldine Robeson
8425 Hastings Court
Sacramento, CA 95826

Re: Retail Clerks Union Local 588
(Union ER)
Case No. 20-CA-10401

Dear Ms. Robeson:

I have your May 28, 1977, letter regarding your backpay amount and have carefully considered the contention raised regarding the Compliance Officer's computation of backpay.

We regret that you are not satisfied that you were fully redressed for the Union's violation in illegally discharging you.

As the Region's Compliance Officer explained to you, we must be able to prove that a backpay claimant remained in the labor market and exercised requisite diligence in seeking interim employment at all times during his or her backpay period. The standards imposed by the Board, as approved by courts require more than mere registration at state unemployment offices and/or union registration facilities. A backpay claimant also must make independent efforts to find employment after being discharged. Failing this it cannot be said the claimant was sufficiently diligent with respect to his or her efforts to secure employment. In these circumstances we should be unable to prevail on the claimant's behalf in the course of backpay litigation due to well settled law that backpay cannot be computed for times when employment is not more actively sought than merely by placing one's name on registration lists.

In your case the validity of the rule regarding the making of independent efforts to find employment particularly is illustrated by your having succeeded in being hired almost immediately after you acted in response to the Compliance Officer's warning that mere registration was insufficient if you wished to preserve your entitlement to backpay. This would militate against a conclusion that earlier efforts on your part, had they been made, would have been futile.

Attachment C

The Union is held to have discharged its pecuniary obligation by having paid you the amount determined to be due you for times when you did seek and accept available employment. Under existing law relating to backpay the Union cannot be held liable for backpay for times when you failed to exercise requisite diligence in seeking employment.

For the foregoing reasons I have no alternative but to decline your request for further backpay proceedings in this matter.

If you wish to obtain review of my decision herein you may write to the General Counsel, National Labor Relations Board, 1717 Pennsylvania Avenue, N.W., Washington, D. C. 20570.

Very truly yours,

Natalie P. Allen
Regional Director

AUG 12 1977

8425 Hastings Court
Sacramento, CA 95826
August 6, 1977

The General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N. W.
Washington, D. C. 20570

RE: CASE NO. 20-CA-10401

Dear Sir:

I am writing to appeal the decision of Natalie P. Allen, Regional Director, Region 20.

Enclosed is a copy of my original appeal to her dated May 28, 1977 and her subsequent decision dated July 18, 1977.

It is my conviction that the N.L.R.B. has been remiss in its obligation to inform union members of its rules and regulations, then, ex post facto, penalizing them unfairly. In my case, the penalty was not only in lost back wages but pension and vacation benefits as well.

It is hoped your office will be able to intervene and reverse this decision so that the just intent of Judge Rasbury's decision may prevail in its entirety.

Sincerely yours,

Geraldine Robeson

Geraldine Robeson, Member
Retail Clerks Union Local #588

Enclosures

Attachment D

Region 20

SEP 12 1977

Ms. Geraldine Robeson
8425 Hastings Court
Sacramento, CA 95826

Re: Retail Clerks Union Local 588
Case No. 20-CA-10401

Dear Ms. Robeson:

This is in reply to your August 6, 1977, letter concerning an appeal to the decision of Regional Director Natalie P. Allen relative to the tolling of backpay.

We have requested Regional Director Natalie P. Allen for information concerning the matters raised in your letter and we shall communicate with you further upon receipt of this information.

Very truly yours,

Peter B. Hoffman
Deputy Assistant General Counsel

PBHoffman:ids 9/9/77 w/~~attx~~xxx

bc Region 20 w/c/1/c: Please submit a report on the matters raised in Ms. Robeson's letter.

Attachment E

NOV 14 1977 Region 20

Ms. Geraldine Robeson
8425 Hastings Court
Sacramento, CA 95826

Re: Retail Clerks Union Local 588
Case No. 20-CA-10401

Dear Ms. Robeson:

This is in further response to your August 6, 1977, letter wherein you have requested a review of Regional Director Natalie P. Allen's July 18, 1977, decision to decline your request for further backpay proceedings in the above-captioned case. My inquiry into this matter has disclosed the following.

On February 20, 1976, pursuant to an unfair labor practice charge you had filed against Local 588 of the Retail Clerks, the Regional Director for Region 20, San Francisco, California, issued a Complaint and Notice of Hearing against the Union, alleging that it had violated the Act when it discharged you on June 18, 1975. Accompanying a copy of the Complaint which was served on you was literature describing your obligation to search for interim employment. On December 7, 1976, the Board issued its Decision and Order in this case finding that your discharge violated the Act as alleged in the Complaint. In May of 1977 you were informed by Ms. Shirley Bingham, Compliance Officer for Region 20, that you were not entitled to backpay from the date of your discharge until May 1, 1977, because of your failure to make diligent efforts to obtain interim employment during that period. It is undisputed that apart from registering for unemployment and seeking referral through the Union, you made no other independent effort to seek interim employment until shortly after April 28, 1977, when you were reminded by the Region of your obligation to do so.

As Ms. Allen indicated in her aforementioned July 18, 1977, letter, in the circumstances of this case, mere registration with the state unemployment office and the Respondent Union, particularly when it is apparent that the latter does not normally refer members to office clerical positions, does not constitute requisite diligence in seeking interim employment. With regard to your argument that you failed to seek such employment sooner because the Region was "remiss" in not notifying you earlier of your obligation, I find such a contention to

Attachment F

be without merit. Thus, the failure of Regional Office personnel to notify discriminatees of their obligation to seek interim employment does not release such discriminatees of their obligation under the law to make a reasonable search for work during the backpay period.

In view of the above, your request that we reverse the July 18, 1977, decision of Regional Director Allen must be denied.

Very truly yours,

Peter B. Hoffman
Deputy Assistant General Counsel

PBHoffman:ids 11/11/77

bc: Region 20

Keller & Stallard
Attorneys at Law
666 Dead Cat Alley Woodland, Ca 95695
(916) 666-1917 Cable: Deadcat

January 4, 1978

MS. NATALIE P. ALLEN
Regional Director, Region 20
National Labor Relations Board
450 Golden Gate Avenue
Box 36047
San Francisco, CA 94102

Re: Retail Union Clerk's Local 588, Case #20-CA-10401

Dear Ms. Allen:

I have been retained by Ms. Geraldine Robeson, the charging party in the above-referenced case, for the purpose of representing her in regard to a back pay dispute arising out of Administrative Law Judge Rasbury's decision in this case.

This letter is to request that you issue and serve on all parties a back pay specification in the name of the Board to resolve the following questions:

1. Did the charging party exercise due diligence required by Board and Court precedent in order to qualify for back pay during the entire period during which she was wrongfully discharged?

2. If she did not exercise such diligence, should this failure be charged to her if she were not informed of the requirement?

3. Was she informed of the requirement to exercise due diligence?

This request is made pursuant to Section 102.52 et seq of the Rules & Regulations of the NLRB as interpreted by the case of Plasterer's Local 5 (John P. Phillips Plastering Co.) 62 LRRM 1641.

Thank you for your cooperation in bringing this matter to a just and equitable conclusion.

Yours truly,

WKeller

WILLIAM H. KELLER

WHK/ket
cc: Mr. Robert Cowell, Esq: Ms. Geraldine Robeson

Attachment G

6721

January 11, 1978

William H. Keller, Esq.
Keller & Stallard
666 Dead Cat Alley
Woodland, CA 95695

Re: Retail Clerks Union Local 588
Case No. 20-CA-10401

Dear Mr. Keller:

This is in response to your January 4, 1978 letter requesting the issuance of a backpay specification in the captioned case. The request is denied for the following reasons:

1. Section 102.52 of the Board's Rules and Regulations authorizes the Regional Director to issue a backpay specification only where ". . .a controversy exists between the Board and a respondent concerning the amount of backpay due. . ." Here no such dispute exists, rather it appears the dispute is between your client, the claimant, and this office.

2. Plasterers Local 5, 62 LRRM 1641, upon which you rely does not appear to require the issuance of a backpay specification in these circumstances but merely gives the claimant certain rights once such a specification has been issued.

3. The issuance of a backpay specification is a matter within the prosecutorial discretion granted the General Counsel of the Board pursuant to Section 3(d) of the Act.

4. On August 6, 1977 your client exercised her right to appeal to the Office of the General Counsel the decision of this office concerning the basis of backpay computation herein. Thereafter on November 14, 1977 the Office of the General Counsel denied her appeal and sustained

Attachment H

the position previously taken by this office. The refusal to issue a backpay specification at this time is in conformance with the General Counsel's action on your client's appeal.

In summary, I regret that we have been unable to reach an agreement with your client on the basis of backpay computation, but I am constrained by the factual and legal circumstances set forth above to deny your request.

Very truly yours,

Natalie P. Allen
Regional Director

CERTIFICATE OF SERVICE

Docket #78-1414

I hereby certify that on this 17th day of April, 1979, three copies of the Supplemental Appendix were mailed, postage prepaid to the following persons:

MR. BARRY JELLISON, ESQ.
David, Cowell & Bowe
351 California Street
San Francisco, CA 94104

MS. AILEEN ARMSTRONG
Assistant General Counsel
for Special Litigation
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570

SOLICITOR GENERAL
10th & Constitution Ave., N.W.
Washington, D.C. 20530

I further certify that all parties required to be served have been served.

WILLIAM H. KELLER
KELLER & STALLARD
Attorneys at Law
666 Dead Cat Alley
Woodland, CA 95695
916/666-1917

Counsel for Petitioner

-oOo-